

MEMO
1-16-21
From Tom Sharp

Board Members of UYWCD and Staff:

Yesterday, UYWCD staff sent to all Board Members of the Upper Yampa District the board packet for the Board meeting which will occur next Wednesday, January 20. Among the items for action on the Agenda for the meeting is Item 8)(c), the Stagecoach Reservoir Water Marketing Policy, the MAIN BODY TEXT of which is dated January 20, 2021 (the “January 20 Draft Policy”). Staff is recommending to the Board, under Section III(1) of the Memo to the Board, that the Board approve a motion approving and adopting the January 20 Draft Policy, with the inclusion of the suggested edits as indicated in the January 20 Draft Policy.

First, I appreciate and very much support the Board finally considering and adopting the text of a Water Marketing Policy for Stagecoach Reservoir. And I appreciate all the hard work of Andy getting the Board to this point on these matters. I have been urging the adoption of written policy on these matters for several years, as many of you will recall my expressions in October Board retreats. I appreciate the willingness of both the staff and my fellow Board Members on the Negotiating Committee (Messrs. Brenner and Monger) to permit me to have many numerous language inputs and edits into what is now the proposed January 20 Draft Policy which is attached to the Jan 20 Board packet.

However, I will vote AGAINST the January 20 Draft Policy as presented in the Board Packet emailed out to all Board members yesterday, unless amendments 1, 3 and 4 as described below are approved by the Board.

As and when a board member moves approval of the January 20 Draft Policy in its form as contained in the Board packet sent out yesterday, I will propose to AMEND such January 20 Draft Policy with the following “Series” of Amendments in the following order:

Sequential SERIES of T. Sharp proposed Amendments:

1. In Subsection 4-g-i, AMEND the second sentence of the first paragraph to read “The maximum duration or term for delivery of stored water of the District for municipal contracts entered into in 2021 and thereafter shall be from the date of execution of such Contract through the end of the 2041 Project Contract Year”

AND

In Subsection 4-g-i, in the first sentence of the second paragraph, on lines 12 and 13 of such second paragraph, change the phrase “at the end of forty (40) years from the date of execution” to instead read “at the end of the 2041 Project Contract Year”

AND

In Subsection 4-g-i, in the first sentence of the second paragraph, on lines 14 and 15 of such second paragraph, change the phrase “ends before forty (40) years” to instead read “ends before the end of the 2041 Project Contract Year”

AND

In Subsection 4-g-i, in the first sentence of the second paragraph, on line 15 of such second paragraph, change the phrase “in the event that the contract is for 40 years” to instead read “in the event that the final Project Contract Year of the existing contract is the 2041 Project Contract Year”

AND

In Subsection 4-g-i, in the first sentence of the second paragraph, on line 17 of such second paragraph and on line 27 of such second paragraph, change “35” to “20”.

T.SHARP COMMENT: The above amendments are intended to change the proposed Policy regarding the duration of future Municipal contracts for storage water out of Stagecoach Reservoir to be a duration ending in 2041, with the right of the municipality to enter into a further 20-year allotment contract at that time on the form and at the price then existing under the District’s water policy at that time. I am aware that, on an informal “straw” indication at a prior virtual board meeting in November, a majority of the board members seemed to be willing to have the policy provide for a 40 year contract, regardless of when signed, and then a right to have a 35 year extension. I did not agree to that view then, and don’t agree with that view now. And the above amendment is intended to confirm a duration of 2041 Plus another 20 years for municipal contracts. I will request a roll-call vote on this amendment.

2. If the Amendments proposed in paragraph 1 above do NOT receive a second to the motion, or if the motion is voted upon and the motion FAILS on the Board vote, then I will then move to Amend the first paragraph of Subsection 4-g-i to insert the following additional sentence between the third sentence and the fourth sentence of the first full paragraph:

“Each municipal contract whose duration exceeds 20 years (the “20-Plus Contract”) shall contain a clause by which the District reserves the right and authority to increase, at its sole discretion, the annual base contract pricing per acre foot of water, in the 2042 Project Contract Year of such 20-Plus Contract, up to a price then competitive with the market for similar municipal water supplies in similar quantities in the Yampa River Basin, such competitive pricing to include reference to contracts from the District to others for municipal water supplies which have been executed after the 20-Plus Contract, and thereafter during each year of the 20-Plus Contract beyond the 2042 Contract Year such annual price shall continue to be adjusted by the CPI as provided in Subsection 4-h below.”

T. SHARP COMMENT: If the majority of the Board, by the rejection of my amendment proposal under paragraph 1 above, favors permitting 40-year municipal contracts with a 35-year optional extension, total of 75 years, I believe at the very least that the PRICE of the water at the end of 2041 should be adjusted to reflect the then competitive water pricing for similar municipal water out of the Yampa, and then the CPI additions would continue for the balance of the total initial term. I don’t think it is enough to just adjust for CPI over 40 years. I believe there are so many trends in Colorado River issues and Yampa issues and economy within the District and demands for water that it is foolish for the District to think that it knows the correct “price number” now AND that such price determined now will be (subject to it being kept current in the purchasing power of the dollar over time by the CPI) the correct “price number” for 40 years. Having been a board member for more than 40 years, I am fully aware that there are MANY

trends that are wholly unpredictable over such a long period of time, and I think it is a denial of flexibility to the District and its staff and board to “lock in” a base price number for 40 years. I think that will put incredible pressure on the board that will exist in 2041 to renew the municipal and industrial allotment contracts that will expire then (the Yamcolo contracts) or whose pricing may be adjustable then, to be at the then rate of the 40 year contracts. I understand why the City of Steamboat wants a long-term contract assurance of the Stagecoach water supply, but that is very different from wanting a long-term PRICE fix for such water. This proposed second amendment from me would preserve the 40 years of term which I suspect the majority of board members want to do, but would only “lock in” the price through the 2041 Project Contract Year.

3. Amend Subsection 4-g-iii by deleting the 3rd sentence of the first full paragraph and inserting the following in lieu thereof: “Longer-term durations for environmental or recreational or in-stream flow enhancement agreements will not extend beyond three (3) Project Contract Years in succession.”

T. SHARP COMMENT: I have also often expressed to all of you that I do not favor a long-term Recreational/Environmental Allotment Contract (“REC”) because (a) it is likely that RECs will be for large quantities of water, and our water engineers advised us in a comprehensive report several years ago that 3 consecutive years of severe drought, of the kind that occurred in the 1200's and in the 1800's, and may well be occurring now (50+ years of sever drought), will result in Stagecoach Reservoir not being able to refill, and (b) the state of law and regulation on in-stream flow water and recreation/environmental water not adjudicated to the CWCB continues to evolve and is not currently settled in any manner. I am in favor of 1-year contracts by the UYWCD board for RECs. I believe that preserves maximum flexibility in the District. The fact that such duration complicates the work of an allottee, such as the Water Trust, in being able to contract each year does not seem to me to outweigh the concerns above. We have had a decade of history doing 1-year contracts in the severe drought years, and not doing any REC in an average or above-average flow year. I greatly prefer that approach.

4. DELETE the following sentences from the second paragraph of Subsection 4-h:

“Given the evolving nature of environmental and recreational water agreement legal authorization(s) and delivery administration in the State of Colorado, the District may consider additional payment terms for environmental and recreational contract agreements. All payment terms for water storage contracts, unless otherwise specified in section 1. b. of this policy, require the authorization of the Upper Yampa Water Conservancy District Board of Directors.”

T. SHARP COMMENT: This wording was added by UYWCD staff since November, in order to “water down” the wording just prior to this insertion, which prior wording makes clear that ALL water contracts by the District must be on “take or pay” terms, i.e., whatever amount the allottee and the District contract for, that amount must be “set aside and reserved annually by the District” for the allottee, and must be paid for at the per acre foot price by the allottee, whether or not the allottee takes the water that year. Except for the 2020 Water Trust contract, every other water contract by the District for 40 years has been that “take or pay” form. I do not favor any other form, I voted against the 2020 Water Trust contract in part because of those “reserved but

not paid for” terms, and I do not favor the addition of the above wording which I believe is intended to “water down” and permit non-take-or-pay contracts for REC purposes. I therefore seek this amendment to remove that wording.

I believe the above amendments are controversial, both as to the City requests and the Water Trust requests, and I fully expect that the ensuing votes on these amendments and the January 20 Draft Policy will not be unanimous by the Board but will reflect split decisions.

The Negotiating Committee of the Board is fully aware of the above proposed amendments, and has not taken any position or vote within that Committee on the above amendments. However, Chairman Brenner has stated to all members of the Committee and staff that he opposes all of the above amendments.

Just a suggestion, but you all may want to print out this email so that when I offer up these amendments on January 20 during the virtual meeting, you all will have the proposed wording changes in front of you, so that you can vote.

I request that the Chairman have roll-call votes of each Board Member on any motion to adopt the January 20 Draft Policy, and on each of the above proposed amendments. I will not go into any long discussion on each proposed amendments because I have done so above in this email.

I request, Andy, that in order that the City and Water Trust be informed of my proposed above amendments, that you transmit a copy of this email to the City and Water Trust representatives.

Many thanks to all of you. See you next Wednesday on the virtual channel!!

Tom Sharp

From: [Ken Brenner](#)
To: [Doug Monger \(dmonger@co.routt.co.us\)](#); [Nicole Seltzer](#); [Lyn Halliday](#); [Jim Haskins \(haskywild@mail.com\)](#); [Webster Jones \(hwebster@frii.com\)](#); [John Redmond](#); [Ron Murphy \(rmurphy100bc@gmail.com\)](#); [Tom Sharp](#)
Cc: [Andy Rossi](#); [bweiss@wvsc.com](#)
Subject: Fwd: FORCE MAJEURE LANGUAGE
Date: Tuesday, January 19, 2021 4:19:14 PM

Directors and staff,

As Director Sharp has suggested in his amendments, I would like to acknowledge that there could be some unforeseen, unexpected or unanticipated event or set of conditions which could result in the price for water sold by the District being insufficient to sustain the District's operations and responsibilities. One way we might give future Directors a way to address that situation would be to add a "Force Majeure" clause to the Stagecoach Water Marketing Policy. You have proposed language in this email that I would like to discuss with you tomorrow for your consideration of adding to the SWMP.

Please accept my apology for not having this to you sooner. Thank you for considering this approach and language as a way for future Directors to address a catastrophic event or significant change to the finances of the Upper Yampa Water Conservancy District.

Ken Brenner
Upper Yampa Water Conservancy District, Board President
FIS Alpine Technical Delegate
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Steamboat Springs, Co 80477
970-819-6178

----- Forwarded message -----

From: **Bob Weiss** <bweiss@wvsc.com>
Date: Tue, Jan 19, 2021 at 3:50 PM
Subject: FORCE MAJEURE LANGUAGE
To: Ken Brenner <kpbrennersteamboat@gmail.com>
Cc: arossi@upperyampawater.com <arossi@upperyampawater.com>

Ken –

At your request I have prepared the following sentence to be added to the Stagecoach Marketing Policy to allow for a price increase during the contract term in excess of CPI based on Force Majeure circumstances. Disputes under a provision of this type could be resolved in Court in the same manner as other disputes under the contract or an arbitration clause could also be considered. Comments welcome.

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH OF PARAGRAPH 1 (h) (Pricing) OF THE STAGECOACH RESERVOIR WATER MARKETING POLICY

If, not earlier than ___ years after the date of this agreement, (1) the adoption or change of any law, rule, regulation, or permit condition applicable to the District's facilities or operations at Stagecoach Reservoir or any change in the interpretation or administration thereof by any governmental authority or, (2) the occurrence of any act of God, natural disaster, or unavoidable casualty event results in a material increase in the cost of operations or capital improvements to Stagecoach Reservoir facilities, the District shall have the right to increase pricing in excess of the amount authorized pursuant to the preceding sentence in the amount and for such period of time as the Board of the District finds reasonably necessary to defray such increased costs.

Bob

DRAFT WORKING DOCUMENT FOR ANALYSIS AND DISCUSSION ONLY

1/20/2021		Stagecoach Reservoir Water Contract Pricing				Notes: BP +/- "\$ amount"
		DRAFT Appendix B SAMPLE PRICING ALTERNATIVES FOR DISCUSSION PURPOSES ONLY				
Contract Category		Earliest Contract Year = 2021				
		Contract Period (Years or End Date)				
		11 years to 2041	6 to 10 years	1 to 5 years		
Industrial	Contract Volume (AF)				BP = Base Price (TBD by UYWCD BOD)	
	1 to 2000	127.79	132.79	137.79		
		Contract Period (Years or End Date)				
		11 to 40 years	6 to 10 years	1 to 5 years		
New Municipal	Contract Volume (AF)				BP = Base Price (TBD by UYWCD BOD)	
	1 to 2000	82	87	92		
		Contract Period (Years or End Date)				
		Existing Contract Term				
Existing Municipal	Contract Volume (AF)				CP = Contract Price calculated as per existing contract terms w/Budget Data	
		CP				
		Contract Period (Years or End Date)				
		Contract Term (all end in 2041)				
Environmental Recreational	Contract Volume (AF)				BP = Base Price (TBD by UYWCD BOD)	
	1 to 2000	46.00				
		Contract Period (Years or End Date)				
		11 years to 2041	6 to 10 years	1 to 5 years		
Agricultural	Contract Volume (AF)				BP = Base Price (TBD by UYWCD BOD)	
	1 to 2000	22	27	32		
		Contract Period (Years)				
		40 years				
Augmentation	Contract Volume (AF)				Price Approved by BOD Annually	
	1 to 10 (Greater than 10 AF requires Approval by UYWCD BOD)	212.72				

DRAFT